(12) (12)

Office-Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 84-28 and 84-143

In The

# Supreme Court of the United States

October Term, 1984

No. 84-28

**DONALD C. BROCKETT,**
Spokane County Prosecuting Attorney
*Appellant,*

vs.

**SPOKANE ARCADES, INC., et al.,**
*Appellees,*

No. 84-143

**KENNETH EIKENBERRY,**
Attorney General for the State of Washington, et al.,
*Appellants,*

vs.

**J-R DISTRIBUTORS, INC., et al.,**
*Appellees,*

On Appeal From The United States
Court Of Appeals For The Ninth Circuit

## BRIEF AMICUS CURIAE OF TOM COLLINS, AS COUNTY ATTORNEY FOR THE COUNTY OF MARICOPA, STATE OF ARIZONA, IN SUPPORT OF APPELLANTS

BRUCE A. TAYLOR
2331 W. Royal Palm Rd. #105
Phoenix, Arizona 85021
(602) 995-2600
*Counsel of Record*
*For Amicus Curiae*

Sandor O. Shuch
Deputy County Attorney
Maricopa County, Arizona
201 W. Jefferson Street
Phoenix, Arizona 85003
(602) 262-8541
*Of Counsel*

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## INTEREST OF THE AMICUS CURIAE

Your amicus curiae is the Honorable Tom Collins, duly elected County Attorney for Maricopa County, Arizona. He is the chief law enforcement officer of the County, with criminal jurisdiction over felonies and misdemeanors as well as civil practice and advice duties to County governmental agencies.

There are approximately forty-five (45) so-called "adult" bookstores and theatres which carry exclusively "hard-core" pornographic magazines, films, video cassettes, sexual devices such as dildos and bondage equipment, and silent short-film "peep shows" in small booths. In addition, several "adult" motels offer hard-core films to paying customers, numerous video cassette rental and sales outlets carry hundreds of hard-core pornographic cassettes, and several bars and burlesque houses employ

young females to expose their vagina and anus areas and breasts to paying customers. All such hard-core pornography and nude "entertainments" are illegal under Arizona state statutes. Prosecutions, injunctions, and nuisance abatement actions have been brought and continue to be litigated in state courts.

The diversity of opinion by lower federal and state courts deserves correction as we enter a new era of enforcement against an illegal organized crime industry which has grown out of control and now enters the home through cable and pay television, dial-a-porn telephone services, and "men's sophisticate magazines" available at nearly every corner convenience store and newsstand. Sexual crimes against women and children are among the only classifications of crimes which are steadily increasing, and are becoming

more violent and bizarre. In the opinion of veteran law enforcement officers and many researchers and therapists, such sex crimes are increasingly connected with pornography and its effect on heightening the arousal and deviant tendencies of offenders. This nationwide problem cannot be ignored, yet state prosecutors are now being diverted from their law enforcement response by lawsuits from the pornography industry in federal courts. Attacks against new and existing statutes and ordinances are resulting in the review of state laws by federal judges rather than state courts. Awards of attorneys fees whenever a federal judge differs in opinion with the choice of words in legislation are intimidating city and county councils and state legislatures, who are faced with mounting financial problems on one hand and

growing organized crime and related individual offenses on the other.

Your amicus curiae has recently been the subject of a similar federal challenge to the existing Arizona Obscenity Statutes, brought on behalf of several pornographers by the same attorney representing the Appellees in this case. The Complaint in Polykoff, et al. v. Tom Collins, ___ F.Supp. ___ CIV 84-1101, was filed in the U.S. District Court in Phoenix and asked that the Court declare the state statutes invalid, primarily in reliance upon the Ninth Circuit opinion now before the Court here, and sought an injunction under 42 U.S.C. 1983, and attorneys fees under Section 1988. Your amicus curiae immediately filed a civil declaratory action regarding the challenged statutes in the state court against the federal plaintiffs. (The federal plaintiffs-

state defendants objected and moved to dismiss the state action, which was subsequently dismissed over our objection after the federal court ruled in the State's favor.) The Honorable District Judge Charles L. Hardy assumed jurisdiction but entered judgment, on July 11, 1984, in favor of the State and your amicus curiae. Judge Hardy first found that abstention was not required and then distinguished the Ninth Circuit decision from the statute and case law construction by the Arizona Supreme Court. See Appendix "A" for the District Court decision of Judge Hardy. Judge Hardy found that the Arizona Supreme Court's interpretation of "prurient" and the provision of high fine limits under Arizona's felony obscenity law were constitutional. The Plaintiffs have filed an appeal from this judgment in the

Ninth Circuit, where the case is now pending, Case No. 84-2328.

Clarifying the steps in determining jurisdiction, in considering abstention, declaratory relief, and then injunctive relief, would eliminate much improper litigation of these state law issues and restore proper deference to state courts. Your amicus curiae, being faced with the duty to enforce state laws and the burden of defending such federal lawsuits, has an interest in the resolution of these issues of federal review and substantive obscenity law questions. This case will be the most important obscenity case since Miller, and could be the most significant statutory review case ever.

Your amicus curiae hereby offers a summary of existing case law and proposals for future guidance in the resolutions of these controversies.

## SUMMARY OF ARGUMENT

I. Federal Courts Lack Jurisdiction To Review State Laws Unless They Meet The Watson v. Buck Test Of Total Invalidity Incapable Of Narrowing Construction, Either Facially Or As Applied.

II. Federal Courts Should Abstain From Exercising Jurisdiction Over Declaratory Or Injunction Claims Unless It Is First Pleaded And Proved That State Procedures Are Inadequate To Provide Due Process Or That There Is Bad Faith Or Harassment.

III. Even Where Declaratory Relief Is Appropriate, Federal Courts Must Still Consider Injunctive Claims Separately And An Injunction Should Issue Only Where There Is Evidence

That The Federal Declaratory Order Will Be Ignored In Bad Faith.

IV. The Concept Of Prurient Appeal Is Not Limited To Appeal To A "Shameful And Morbid" Sexual Interest And Properly Includes The Commercial Appeal To Erotic, Lustful, And Otherwise Attractive, As Well As Repulsive, Sexual Interests.

V. The Penalty Provisions Of The Washington Statute Are Not Unreasonable On Their Face And Can Be Applied Constitutionally.

## LAW AND ARGUMENT

Proposition of Law Number I:

> Federal Courts Lack Jurisdiction To Review State Laws Unless They Meet The Watson v. Buck Test Of Total Invalidity Incapable Of Narrowing Construction, Either Facially Or As Applied.

In Watson v. Buck, 313 U.S. 387, at 401-02 (1941), the Court refused federal review of Florida statutes because there were no "exceptional circumstances", no "great and immediate" danger of irreparable loss, and the "Florida Supreme Court, which under our dual system of government has the last word on the construction and meaning of statutes of that state, has never yet passed upon the statutes before us. It is highly desirable that it should have an opportunity to do so." The Court's reasoning for deferring to state courts is more applicable and needed now than it

was in years past: "Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." Id., at 402.

The Court then announced, at 402, an exception to this rule which, amicus submits, should be the primary threshold question in determining federal jurisdiction to consider declaratory claims:

> It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.

The Ninth Circuit below, in J-R Distributors v. Eikenberry, 725 F.2d 482,

at 487, concluded that facial challenges to state statutes need not involve "substantial" overbreadth "in the area of first amendment rights", citing its decision in Stroianoff v. Montana, 695 F.2d 1214, 1218 (9th Cir. 1983), and thereby distinguishing Broadrick v. Oklahoma, 413 U.S. 601 (1973). The Ninth Circuit, at 487, also distinguishes Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494 (1982), by concluding that such overbreadth rules only apply to conduct and not "pure speech".

Amicus submits that obscenity statues are not "pure speech" regulations, as are political or religious dialog or verbal expression cases. As held in People v. Souter, 178 Cal.Rptr. 111 (Ct. App. Cal. 1981), paying actors and actresses to engage in explicit sex acts before a camera in order to produce pornography is a

violation of prostitution and pimping statutes. The distribution of such hard-core pornography is therefore exploiting the work of prostitutes, and is at least a mixture of conduct and speech. Modern hard-core pornography should not be elevated to the protected class which political, racial, and religious expression deserves. In the obscenity law area, the rule of substantial overbreadth should apply, as stated in Watson v. Buck, supra, and as this Court stated in Hoffman Estates, 455 U.S., at 494-95. This Court then stated, in Footnote 5, that:

> 5. A "facial" challenge, in this context, means a claim that the law is "invalid in toto--and therefore incapable of any valid application."

The primary threshold question for any court before whom a lawsuit has been filed involves the inherent jurisdiction to determine jurisdiction. In this

regard, whether the state statute being attacked is new or existing, the federal court should first determine whether it meets the test of Watson v. Buck, 313 U.S., at 402 (1941).

A review of the challenged statute by this rule, to determine whether it is totally unconstitutional under any circumstances or at least incapable of constitutional application to the complaining parties or under the circumstances alleged, would involve the federal courts only in those situations where a state law is so vague or overbroad that it has no meaning whatsoever or encompasses clearly protected conducted or speech. If the statute under consideration is not so totally repugnant to constitutional guarantees that it could not be narrowly construed by the state courts, then the federal courts should leave to the state

courts the determination of the validity and application of such statutes. In this instance the federal courts could best be guided by the abstention principles of Railroad Commission v. Pullman, 312 U.S. 496 (1941), if it is a new statute, and by the principles of Dombrowski v. Pfister, 380 U.S. 479 (1965), and Steffel v. Thompson, 415 U.S. 452 (1974), if it is an existing statute. If the federal court is not faced with such a totally invalid statute, it should determine that it has no jurisdiction to review such a state law and immediately dismiss the case for failure to state a claim under either the Declaratory Judgment Act or the Civil Rights Act. Fenner v. Boykin, 271 U.S. 240, at 244 (1926). See also: Vicory v. Walton, 721 F.2d 1062, at 1065-66 (6th Cir. 1983), cert. denied, ___ U.S. ___, 53 L.W. 3237, No. 83-2111 (Oct. 1, 1984).

In the obscenity case now before this Court, the new Washington statute could not be said to be "incapable" of a narrowing construction, either as it defined "prurient" or as it provided for penalties. Obscenity laws have been perhaps the most often construed and interpreted of all statutes. The role of this Court in defining the basic "test" for both federal and state courts has resulted in a response by the courts to construe old statutes in light of the latest pronouncements. See: Kingsley Pictures v. Regents, 360 U.S. 684, at 688 (1959); Mishkin v. New York, 383 U.S. 502, at 507-08, 510-11 (1966); U.S. v. 37 Photographs, 402 U.S. 363 (1971); Miller v. California, 413 U.S. 15, at 25 (1973); Ward v. Illinois, 431 U.S. 767, at 772-73 (1977); and New York v. Ferber, ___ U.S. ___, 73 L.Ed.2d 1113 (1982).

Many state courts have a history and willingness to interpret state laws to conform with case law, and in these states the federal courts cannot say that narrowing constructions are not possible or that state declaratory or criminal actions cannot adequately protect constitutional rights. See: State of Washington v. J-R Distributors, 512 P.2d 1049 (Sup.Ct.Wash. 1973) (construing obscenity statute); State of Arizona v. Bartanen, 591 P.2d 546, at 550-52 (Sup.Ct.Ariz. 1979) (defining "prurient"); State of Arizona v. Book-Cellar, 679 P.2d 548 (Ct.App.Ariz. 1984) (construing and upholding obscenity nuisance statute); State of Ohio v. Burgun, 56 Ohio St.2d 354, 384 N.Ed.2d 255 (Sup.Ct.Ohio 1978) (construing criminal obscenity statute), approved and followed in Sovereign News v. Falke, 674 F.2d 484 (6th Cir. 1982), cert. denied,

74 L.Ed.2d 120 (1982), and in Turoso v. Cleveland Municipal Court, 531 F.Supp. 829 (N.D. Ohio 1980), aff'd., 674 F.2d 486 (6th Cir. 1982), cert. denied, 74 L.Ed.2d 145 (1982); State of Ohio, ex rel. Ewing v. "Without a Stitch", 37 Ohio St.2d 92, 307 N.E.2d 911 (Sup.Ct. Ohio 1974) (construing obscenity nuisance statute), affirmed sub nom Art Theatre Guild v. Ewing, 421 U.S. 923 (1975) (by dismissal f.w.o.s.f.q.); State of Idaho, ex rel. Kidwell v. U.S. Marketing, 631 P.2d 622 (Sup.Ct. Idaho 1981) (upholding obscenity nuisance statute and closure remedy), jurisdiction noted, 454 U.S. 1140 (Jan. 11, 1982), appeal dismissed by Appellant- U.S. Marketing over State-Appellee's objection, 455 U.S. 1009 (March 10, 1982); Chateau X v. North Carolina, 250 S.E.2d 603, remanded at 445 U.S. 947, reaffirmed at 275 S.E.2d 443 (Sup.Ct. N.C. 1981) (upholding obscenity

nuisance statute), approved and followed in Fehlhaber v. North Carolina, 675 F.2d 1365 (4th Cir. 1982); People of Michigan v. Neumayer, 275 N.W.2d 230 (Sup.Ct. Mich. 1979) (construing criminal obscenity statute); First Amendment Foundation v. State of Florida, 364 So.2d 450 (Sup.Ct. Fla. 1978) (construing criminal obscenity statute).

Therefore, the Ninth Circuit's decision that the federal court has jurisdiction simply because the plaintiff chose that forum, and struck the entire statute and is willing to enjoin all law enforcement in the state because the legislature included "lustful" as one of the adjectives for prurient, is unconscionable and unreasonable as an intrusion into state powers and judicial functions. Especially is this so since the adjective "lustful" was given to obscenity law by this Court in Roth v.

United States, 354 U.S. 476, at 487, fn.20 (1957), and this Court has specifically approved "erotic" and other "attractive" descriptions of the concept of prurience. See: Ginzburg v. United States, 383 U.S. 463, at 470 (1966); Mishkin v. New York, 383 U.S. 502, at 508-09 (1966); Miller v. California, 413 U.S. 15, at 18, fn.2 (1973); Hamling v. United States, 418 U.S. 87, at 127-31 (1974); Pinkus v. United States, 436 U.S. 293, at 301-03 (1978). See also: Mutual Film Corp. v. Industrial Com., 236 U.S. 231, at 242 (1915), cited in footnote 20 of Roth, supra at 487.

The Ninth Circuit not only should not have concluded that the law was totally invalid, but its ruling on prurient was directly contrary to historical authority on the concept of prurience. Had it followed the Watson v. Buck test, it would have had no choice

but to find a lack of federal jurisdiction to review the Washington statute. Amicus submits that therein lies the error in the ruling under review.

Proposition of Law Number II:

> Federal Courts Should Abstain From Exercising Jurisdiction Over Declaratory Or Injunction Claims Unless It Is First Pleaded And Proved That State Procedures Are Inadequate To Provide Due Process Or That There Is Bad Faith Or Harassment.

Assuming that a federal court finds that it is faced with a challenge against a statute which meets the test of Watson v. Buck, supra, the court's next determination should be whether declaratory relief is appropriate or whether the federal court should abstain from entertaining a declaratory action. In this regard, the federal court should look to the procedures for testing state

statutes which are available in the state court system, including the availability of a state declaratory judgment action as well as the existence of prompt and valid procedures for testing conduct under these statutes in criminal or other civil proceedings. Allen v. McCurry, 449 U.S. 90, at 100-01 (1980). If state procedures are inadequate to provide due process to the federal plaintiffs, the federal court will then find itself in a position of being the only forum capable of determining the validity of the statute and issuing a declaratory judgment thereon. If the state procedures, civilly or criminally, are adequate and available to the federal plaintiff, the federal court should then look to see whether there is evidence of bad faith or harassment on the part of the prosecution or law enforcement officers. If it is evident that the

federal plaintiffs will not be dealt with in good faith by the local agencies, as in Dombrowski, supra, then the court is again faced with a situation where it must step in to protect the federal plaintiff. If the federal court does not find that state procedures are inadequate, or that if adequate would be enforced in bad faith, the court should abstain and dismiss the action. This would be consistent with this court's discussion in Younger v. Harris, 401 U.S. 37, at 46-49 (1971), stating that facing a good faith prosecution or the existence of a chilling effect on First Amendment rights, even under an invalid law, is not sufficient reason for the application of the substantial power of federal jurisdiction.

Although the Court in Steffel, supra, rejected the stricter Younger rules for declaratory actions where no

state case was pending, and held that irreparable harm need not be shown, the reasoning of Steffel is no longer applicable to modern federal-state litigation and this Court should return to the rule of Railroad Com. v. Pullman, supra, especially where a new state law is challenged.

Where state criminal or civil proceedings are pending, or commenced before proceedings of substance are reached in the federal court, there are strict burdens which must be met before a federal court can consider either injunctive or declaratory relief in reviewing a state statute. Younger v. Harris, 401 U.S. 37, at 46 (1971), Samuels v. Mackell, 401 U.S. 66, at 73 (1971), Hicks v. Miranda, 422 U.S. 332, at 349 (1975). Where there is no state criminal or civil action pending, but is threatened or at least likely, federal

intervention might be permissible to consider declaratory relief, but the injunctive relief would still require satisfaction of equitable principles, extraordinary circumstances, and deference to federalism. Steffel v. Thompson, 415 U.S. 452, at 468-69, 475 (1974), Zwickler v. Koota, 389 U.S. 241, at 254 (1967), Douglas v. City of Jeannette, 319 U.S. 157, at 162-64 (1943). Although Steffel was decided at a time when the Court, at 462, stated that considerations of federalism have little vitality when no state proceeding is pending, such a situation no longer exists. Steffel discusses, at 465-68, the "storm of controversy" between federal and state jurisdiction which led to the establishment of the three judge district court system and the enactment of the Declaratory Judgment Act. In 1976, however, the three judge court

provision was repealed and a single federal judge was again empowered to enjoin the enforcement of state law. This development was obviously undertaken because of the strong statements in favor of abstention and respect for the state court system which had developed in the long line of abstention cases where this Court has stated that federal courts should not be the primary arbitors of the language or application of state laws. The continuing vitality of Younger v. Harris, supra, Huffman v. Pursue, 420 U.S. 592 (1975), and Railroad Commission v. Pullman, supra, should have safeguarded the state's rights to enact and enforce statutes and ordinances. Even though this Court has reaffirmed the principles of federalism and abstention in such recent cases as Moore v. Sims, 422 U.S. 415 (1979), Allen v. McCurry, 449 U.S. 90 (1980), and Parratt v.

Taylor, 451 U.S. 527 (1981), and has attempted to restrict and clarify the application of the Civil Rights Statute under Section 1983, these principles are now widely ignored by the lower federal courts. The U.S. Court of Appeals for the Ninth Circuit, in the opinion now under consideration, J-R Distributors, supra at 486-88, now holds that facial attacks on any state statute involving First Amendment expression may be brought in federal court even though the overbreadth is not substantial, and that abstention is the exception and is not preferred.

It is now common to see federal courts accept jurisdiction to review state statutes, especially newly enacted ones, before they may be enforced in state courts. The federal courts are not limiting themselves to entertaining declaratory judgment claims, but are

regularly issuing injunctions against the enforcement of new or existing statutes pending the federal litigation. This situation causes delay of several years before such state laws are even available for interpretation in the state courts. See for example Goldstein v. Allain, 568 F.Supp. 1377 (N.D. Miss. 1983), Community Television of Utah v. Roy City, 555 F.Supp. 1164 (D. Utah 1982), Red Bluff Drive-In v. Vance, 648 F.2d 1029 (5th Cir. 1981), Penthouse v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980), Sovereign News Co. v. Falke, 448 F.Supp. 306 (N.D. Ohio E.D. 1977), rev'd., 674 F.2d 484 (6th Cir. 1982).

This Court has contributed to the perception that abstention is not required, in such cases as: Spokane Arcades v. Brockett, 631 F.2d 135 (9th Cir. 1980), affirmed summarily at 454 U.S. 1022 (1981) and Universal Amusement

v. Vance, 587 F.2d 159 (5th Cir. 1978), affirmed on the merits at 455 U.S. 308 (1980). Proper deference can only be shown to the state court systems if new criteria are announced to guide federal courts in (1) determing whether jurisdiction lies, (2) whether the court should exercise such jurisdiction over the declaratory judgment claims, and (3) over the injunction claims and attorneys fees request.

Proposition of Law Number III:

> Even Where Declaratory Relief Is Appropriate, Federal Courts Must Still Consider Injunctive Claims Separately And An Injunction Should Issue Only Where There Is Evidence That The Federal Declaratory Order Will Be Ignored In Bad Faith.

Although the federal courts, in determining whether to entertain the lawsuit challenging a state statute, should deal with the threshold questions of jurisdiction as invoked by the

presence of a totally invalid statute as well as the lack of an adequate remedy in state court, the federal courts should also refuse to entertain injunction claims under 42 U.S.C., Section 1983, until after the declaratory relief has been considered and determined. As a general rule, the federal courts should at most issue a declaratory judgment where the circumstances require, and only issue an injunction if there has been a deprivation of civil rights shown by past bad faith conduct or a need to issue an injunctive order to protect the integrity of the federal declaratory order. If the federal court is not shown that the declaratory judgment will be ignored in bad faith by state officials, no injunction should be considered. Furthermore, an award of attorney fees should only be assessed against state officials where the challenge to the

statute is shown to be required and justifies an injunction under the civil rights act for an actual deprivation of the federal plaintiff's civil rights.

In Fenner v. Boykin, 271 U.S. 240, at 243-44 (1926), the Court held that, even in the absence of a pending state prosecution, a federal complaint must be dismissed and injunctive relief denied against possible or even threatened future prosecutions unless there are "extraordinary circumstances where the danger of irreparable loss is both great and immediate". In Huffman v. Pursue, 420 U.S., at 602-02, the Court explained that this rule of Fenner was expanded in Younger v. Harris, 401 U.S., at 46, and pointed out that extraordinary circumstances would be found where facts are pleaded and proved to show the type of bad faith and harassment by the state which was present in Dombrowski v.

Pfister, 380 U.S. 479 (1965). Huffman, at 602, also noted that federal intervention might also be justified if the statute meets the Watson v. Buck test of being "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it". However, the Court concluded that "we unequivocally held that facial invalidity of a statute is not itself an exceptional circumstance justifying federal interference with state criminal proceedings". These rules should apply whether prosecutions are pending, as in Younger, or merely threatened, as in Fenner.

Fenner, supra at 244, stated that an "intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted

freely to contest its validity by an original proceeding in some Federal court". Parratt v. Taylor, 451 U.S. 527, 542-44 (1981), held that in order to state a claim under Section 1983, a plaintiff must show that available state procedures are not even adequate to compensate a suffered deprivation. See also: Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981). In Vicory v. Walton, 721 F.2d 1062, at 1065-66 (6th Cir. 1983), cert. denied, ___ U.S. ___, 53 L.W. 3237, No. 83-2111 (Oct. 1, 1984), the Court stated that:

> Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the Constitution's prohibition against property deprivations without procedural due process. Thus we hold that in section 1983 damage suits claiming the deprivation of property interest without

> procedural due process of law, the plaintiff must plead and prove that state remedies for redressing the wrong are inadequate. In a procedural due process case under section 1983, the plaintiff must attack the state's corrective procedure as well as the substantive wrong. In the instant case the plaintiff has neither alleged nor shown any significant deficiency in the state's remedies.

In Allen v. McCurry, 449 U.S. 90, at 100-01 (1980), this Court set out three circumstances for federal remedies under Section 1983; (1) state law is facially and totally unconstitutional, (2) state procedural law is inadequate to allow full litigation of a constitutional claim, and (3) where the procedural law is adequate in theory but inadequate in practice. "In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights."

The policy expressed in Steffel also recognized that the intrusion of injunctions should be imposed only to prevent manifest injustice and in necessary aid of the federal court's jurisdiction. A federal court should not entertain a prayer for injunction unless bad faith is evident, especially where declaratory relief would suffice to protect the rights of the plaintiff. Only where the court is shown that the State would disregard the declaratory judgment or retaliate against the plaintiff should an injunction issue. As stated in McCarthy v. Briscoe, 553 F.2d 1005, at 1007 (5th Cir. 1977):

> This Court presumes that Texas will not defy the holding of unconstitutionality in the absence of an injunction.

Proposition of Law Number IV:

> The Concept Of Prurient Appeal Is Not Limited To Appeal To A "Shameful And Morbid" Sexual Interest And Properly Includes The Commercial Appeal To Erotic, Lustful, And Otherwise Attractive, As Well As Repulsive, Sexual Interests.

The new Washington statute defined prurient as "that which incites lasciviousness or lust". This is a wholly proper definition of the concept of prurience and is consistent with this Court's use of the term and the great weight of authority. The Ninth Circuit was in error in concluding, in J-R Distributors, 725 F.2d, at 491, that the case law developed since 1957 mandates that only "shameful and morbid" can be used to describe a prurient interest. The Court of Appeals states, at 491:

> We agree with these decisions and reaffirm that, under the first prong of the Miller test, a "prurient interest" is "a shameful or morbid interest in nudity, sex

> or excretion." By including "lust" in its definition of "prurient," the Washington state legislature has clearly exceeded the established--though sometimes blurred--boundries drawn by the Supreme Court to distinguish protected first amendment expression from that which is obscene.

The Court based this conclusion on a restrictive reading of footnote 20 of Roth v. United States, 354 U.S. 476, at 487 (1957) and of Red Bluff Drive-In v. Vance, 648 F.2d 1020, 1026 (5th Cir. 1981); U.S. v. "Language of Love", 432 F.2d 705, 711 (2d Cir. 1970), cert. denied, 403 U.S. 925 (1971); and Goldstein v. Allain, 568 F.Supp. 1377 (N.D. Miss. 1983). The Court of Appeals also found that this Court, in referring to the Model Penal Code definition of "obscenity" in footnote 2 of Miller, supra at 18, "has replaced the definitions offered in Roth" and was imposing "shameful or morbid" as the only

adjectival descriptions of the term "prurient". This is an erroneous and unwarranted conclusion and is directly contrary to the language of this Court's opinions and the historical development of the concept of "prurience". This Court has often rejected limiting prurience to only "shameful and morbid" interests. Even the Model Penal Code did not consider the term so limited. The term as defined in the Washington (and Arizona and Mississippi) statute cannot be said to be unconstitutionally and substantially overbroad and this Court should not foreclose the State's right to develop this concept of prurience within historical parameters. Indeed, footnote 2 of Miller refers to Roth, at 487, as providing the source of the "specific judicial meaning" of obscene material. The Model Penal Code itself recognized the erotic quality of obscenity, and its

Commentaries explain this in greater depth. Indeed, Miller's footnote 2 says the word pornography "now means . . . a portrayal of erotic behavior designed to cause sexual excitement".

Confusing the offensiveness of pornography with prurience ignores the reason that Miller provided a three part test. Prurience was retained as a way to require that sexual conduct be exploited for its commercial value rather than its artistic or scientific uses. This is recognized in the cases dealing with "pandering". It is the second prong of Miller which safeguards mere nudity and non-offensive material from prosecution, not the first. Even though attractive and erotic or lustful material may be "prurient", the work must also present hard-core sexual conduct in a "patently offensive way". This prong prevents the type of suppression feared by the Court

of Appeals on pages 490-92 of the opinion below.

It was in footnote 20 of Roth v. U.S., supra at 487, that the Court first defined in its own words that appeal to prurient interest meant "having a tendency to excite lustful thoughts". [Emphasis added.] This remains to this day the only direct and isolated definition ever given by this Court. All other references to prurient interest and what constitutes an illegal appeal to prurience are contextual examples. Together these references by this Court to the concept of prurience serve to guide the courts and juries in finding obscenity, and have never mandated a singular route to such determination.

In Mishkin v. New York, 383 U.S. 502, at 508 (1966), Hamling v. United States, 418 U.S. 87, at 127-29 (1974), and Pinkus v. United States, 436 U.S.

293, at 301-03 (1978), this Court affirmed that when materials are intended to stimulate a specific deviant group or a specific deviant sexual interest, then the jury can decide whether the average person would find the appeal of the matter to be to the "general" prurient interest or the deviant prurient interest.

In Mutual Film Corp. v. Industrial Com., 236 U.S. 230, at 242 (1915), cited with approval in footnote 20 of Roth v. U.S., supra, the general observation was made about the attraction of pornography to normal persons:

> They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to.

This Court later characterized this trait in Ginzburg v. United States, 383 U.S. 463, at 471 (1966), as "the

widespread weakness for titillation by pornography".

This Court has used various descriptive words to illustrate what prurience may mean. Material can be prurient when it either attracts or repulses, as stated in Mishkin at 508. Attractively erotic material, even to the average person, has been held obscene. Ginzburg, supra; Hamling, supra. See also Penthouse v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980), and Miller v. United States, 431 F.2d 655, 658 (9th Cir. 1970). Bizarre material, repulsive to the average person, has also been found obscene. Mishkin, supra; Ward v. Illinois, supra.

This Court used the words "lewd" and "lascivious" in Roth, footnote 20, and also referred to the Model Penal Code's use of "shameful or morbid". In another case which sought to separate protected

sexual expression for political purposes from the pornographic prurience of obscenity, Cohen v. California, 403 U.S. 15, at 20 (1971), said that:

> [T]o prohibit obscene expression, such expression must be, in some significant way, erotic.

Prurient appeal is properly a synthesis of these adjectives to describe an interest in sex for its own sake, for commercial gain. See: Schauer, The Law of Obscenity, at 96-102 (D.C.: BNA, 1976); Model Penal Code, Commentaries, Part II, Article 251.4, at 488-94 (A.L.I., 1980).

It is important to note that the Bar Association's Model Penal Code also recognized the "erotic" nature of prurient appeal and did not preclude this recognition in using the adjectives "shameful and morbid" in its Draft. As

stated in the Model Penal Code Commentaries, supra at 491-92:

> Prurient interest involves an exacerbated, morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and the equally universal social controls of sexual activity. The Model Code provision rests on the proposition that society may legitimately seek to deter the deliberate stimulation and commercial exploitation of emotional tensions arising from this conflict.
>
> * * *
>
> The Model Code definition follows the great weight of prior authority in restricting obscenity to the erotic. This limitation is imposed by requiring that the prurient interest appealed to concern sex, nudity, or excretion. [Emphasis added.]

One of the best examples of this mixture of "tendency to arouse lustful thoughts" and the appeal to a "shameful or morbid interest" is set out in State v. Bartanen, 591 P.2d 546, at 550-52 (Supreme Court, Arizona, In Banc, 1979).

The trial court charged the jury: "The term appeal to the prurient interest means to excite lustful thoughts, a shameful or morbid interest in sex or nudity, arouse sexual desires or sexually impure thoughts, inclined to or disposed to lewdness, having lustful ideas or desires." Id. at 550. The Arizona Supreme Court upheld and approved this definition as a synthesis of the "appeal" and the "tendency" functions of prurience. As stated by the Court, at 552:

> The trial court herein used both the so-called "appeal" approach to obscenity, that is, does the material appeal to a morbid, shameful, disgusting, unhealthy, unwholesome, degrading interest in sex, as well as a "tendency" of the material to excite "lustful ideas or desires."
>
> We believe the trial court correctly instructed the jury.

Such a concept has long been the law of Ohio, and often employed by the trial

courts. See: Youngstown v. DeLoreto, 19 Ohio.App.2d 267 (Ct.App.Ohio 1969).

However, as pointed out in Mishkin, supra at 508; Hamling, supra at 128-30; and Pinkus, supra at 301-03, it is proper, when the evidence calls for it, to allow the jury to measure the material "by its appeal to the prurient interest not only of the average person but also of a clearly defined deviant group". Hamling, supra at 128.

In Hamling, supra at 128, this Court noted that: "Petitioners appear to argue that if some of the material appeals to the prurient interest of sexual deviants while other parts appeal to the prurient interest of the average person, a general finding that the material appeals to a prurient interest in sex is somehow precluded." The Court relied on Mishkin in rejecting this contention, and stated in Hamling, supra at 129:

> The District Court's instruction was consistent with this statement in Mishkin. The jury was instructed that it must find that the materials as a whole appealed generally to a prurient interest in sex. In making that determination, the jury was properly instructed that it should measure the prurient appeal of the materials as to all groups.

It is important to remember that this Court did not define obscenity so that the jury was to decide only whether the matter appealed to the prurient interest of the average person applying contemporary community standards, but rather that the jury determine whether the average person, if the average person applied those standards, would find the appeal to be to a prurient interest. The question is whether the appeal of the material would be to a generally erotic or shameful interest in sex, whether that interest was that of an average person or that of a deviant class. See: State v.

Tidyman, 568 P.2d 666, 674 (Ct. App. Or. 1977).

This subtle distinction is not a harmless one and is important. If a court were to charge a jury that they must find the matter obscene, if at all, only when it appeals or excites a shameful or morbid interest in an average person or in the jury, then confusion would result and the whole purpose of obscenity law would be thwarted.

The legal error in this reasoning is clearly set out in Mishkin v. New York, 383 U.S. 502, at 508 (1966), where this Court explained:

> Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the "average person" in sex, that

> "instead of stimulating the erotic, they disgust and sicken." We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.

Any discussion of the meaning of prurient appeal must also consider the correlative concept of pandering. Pandering is a term of art in obscenity law which relates to exploiting the prurient nature of material for commercial purposes rather than emphasizing some legitimate interest in sex, such as scientific, medical, or education interests in sexual subject matter. This has application in the "Miller Test" in determining the "serious value" of the material, but requires the finding of a commercial appeal to the prurient qualities of the material. This Court's development of the pandering concept illustrates what is meant by the all important ingredient of prurience,

since that is the heart of pandering and the true concept of obscenity regulation. Motivation is very much a part of obscenity law, as evidenced by this Court's holding in Ginzburg v. United States, supra, that sexual matter which may not be obscene per se in other contexts can be the subject of a conviction if it was pandered for prurient interest exploitation. The development of the pandering law also bears on how "prurient" is to be defined and used, and illustrates how an appeal to lust and erotic curiosity form an integral part of prurience, rather than solely a limitation to the "shameful and morbid".

The development of this concept continued in Splawn v. California, 431 U.S. 595, at 598 (1977):

> There is no doubt that as a matter of First Amendment obscenity law, evidence of

> pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.

This is a short statement of the principles applied in Ginzburg v. U.S., supra, 383 U.S., at 466, where the Court stated that it was viewing the material "against a background of commercial exploitation of erotica solely for the sake of their prurient appeal". [Emphasis added.] At 467-68, Ginzburg outlined the advertising and promotion evidence and characterized the business involved as:

> [T]he sordid business of pandering - "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers".

Pinkus v. U.S., supra, 436 U.S., at 303-04, made clear that no extensive evidence need be adduced before an instruction is warranted to assist the

jury in determining whether the material was distributed for its prurient appeal or for its serious value. "In essence, the Court has considered motivation relevant to the ultimate evaluation if the prosecution offers evidence of motivation." Id., at 303.

In a practical application of this principle, the Supreme Court of Indiana upheld a pandering instruction, taken from Splawn v. California, 431 U.S., at 597-98, upon the evidence that the materials were sold from an "adult" bookstore, clearly marked as such, and dealing openly with sexual devices, books, and films of a hard-core pornographic nature. Sedelbauer v. State, 428 N.E.2d 206, at 207-08 (Supreme Court of Indiana, 1981), cert. denied, 455 U.S. 1035 (March 22, 1982).

The jury charge approved by the Court in Splawn, supra at 597-98,

indicates the range of adjectives properly used to describe prurience. The trial court charged the jury:

> If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance. [Emphasis added.]

This Court in Splawn, at 598, also refers to and quotes from Ginzburg, supra at 470, where the Court said:

> The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. [Emphasis added.]

This Court recognized the greater latitude state courts have for forming instructions and held that Ginzburg and Hamling "clearly show" that the charge violated no First or Fourteenth Amendment rights. Splawn, supra at 599.

Many other courts have also discussed the prurience concept and its definitional parameters, and have not limited them in a constitutional sense to the "shameful and morbid" restrictions adopted by J-R Distributors, supra, and Goldstein v. Allain, supra. In fact one New York court noted that "shameful and morbid" was deleted from the New York statute in 1974 and this was in keeping with a shift away from a restrictive reading of the Model Penal Code by the Supreme Court. The court reasoned that the Roth reference was to the "case law developed to date", up to 1957, and that the Court's own definition of "tendency to excite lustful thoughts" was an indication of a new direction. People v. Ciampa, 394 N.Y.S.2d 727, 732 (Sup. Ct., App. Div., 1977).

Following is a list of cases dealing with the various adjectives describing

"prurient". The only common thread is the realization that prurience is not a precise nor limited concept and varies widely. These cases serve to prove that the Washington, Arizona, Mississippi, and other broader definitions of "prurient" accept the parameters of the terms as used by this Court.

Federal cases: Flying Eagle Publications v. United States, 273 F.2d 799, 803 (1st Cir. 1960); U.S. v. Darnell, 316 F.2d 813, 816 (2d Cir. 1963); U.S. v. Keller, 259 F.2d 54, 58 (3rd Cir. 1958); U.S. v. Central Magazine Sales, 381 F.2d 821, 823 (4th Cir. 1976); Interstate Circuit v. City of Dallas, 366 F.2d 590, 596 (5th Cir. 1966); U.S. v. Battista, 646 F.2d 237, 245 (6th Cir. 1981); Luros v. U.S., 389 F.2d 200, 203 (8th Cir. 1968); Eastman Kodak v. Hendricks, 262 F.2d 392, 397-98 (9th Cir. 1958); Childs v. State of Oregon, 431

F.2d 272, 275, 276 (9th Cir. 1970); U.S. v. Pinkus, 551 F.2d 1155, 1159-60 (9th Cir. 1977); U.S. v. One Reel of Film, 360 F.Supp. 1067, 1071-72 (D. Mass. 1973); and U.S. v. 31 Photographs, 156 F.Supp 350 (S.D.N.Y. 1957). See also: Besig v. U.S., 208 F.2d 142, at 145-46 (9th Cir. 1953) (not contradictory to say obscenity "repels" and "seduces").

State cases: State v. LeWitt, 222 A.2d 579, 582 (Ct. App. Conn. 1966); State v. Anonymous, 377 A.2d 1342, 1343 (Super. Ct. Conn. 1977); Spry v. State, 274 S.E.2d 2 (Ct. App. Ga. 1981) (statute uses "shameful and morbid", but permissible for courts to add instructions on "tendency to excite lustful thoughts"); State v. Great American Theatre, 608 P.2d 951, 952-59 (Sup. Ct. Kansas, 1980) (lengthy discussion of history and breadth of term); Little Store v. State, 453 A.2d

1215, 1216-17 (Ct. App. Md. 1983); Commonwealth v. Mascolo, 375 N.E.2d 17, 26 (App. Ct. Mass, 1978); People v. Ciampa, 394 N.Y.S.2d 727, 732 (Sup. Ct., App. Dept., 1977) ("tendency to excite lasciviousness", and lasciviousness is defined as "tending to arouse sexual desire"); State v. Schwing, 328 N.E.2d 379, 382 (Sup. Ct. Ohio 1975) (prurient must be erotic); State v. Tidyman, 568 P.2d 666, 674 (Ct. App. Or. 1977); State v. Grabill, 579 P.2d 316, 320 (Ct. App. Or. 1978); Commonwealth v. Rich, 437 A.2d 516, 519-20 (Com. Ct. Pa. 1981) (no need to define prurient); State v. Barrett, 292 S.E.2d 590, 591-92 (Sup. Ct. S.C. 1982) (Prurient Interest "means a shameful and morbid interest in nudity, sex, or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts."); State v. Little Art Corp., 215 N.W.2d 853, 856 (Sup. Ct. Neb.

1974) (prurient includes "shameful and morbid", "excite lustful thoughts", "tending to excite lasciviousness", and "presence or arousal of sexual desire"); and Andrews v. State, 652 S.W.2d 370, 375-77 (Texas Ct. Cr. App. 1983).

Proposition of Law number V:

The Penalty Provisions Of The Washington Statute Are Not Unreasonable On Their Face And Can Be Applied Constitutionally.

The Ninth Circuit opinion below, at 493-96, makes a wholly hypothetical assumption that the civil fines for maintaining a moral nuisance can be or would be used unconstitutionally. The statute is clear in directing the equity court to fashion a remedy only against a defendant who knowingly violated the law, and to consider wilful conduct and "profits made by the defendant attributable to the moral nuisance".

[Emphasis added.] First, the statute does not specifically state that legitimate profits are to be attached. It clearly states that the court shall consider profits attributed to the nuisance. If there is any vagueness present here, which amicus submits there is not in light of the broad powers given equity and civil courts (such as in all other civil tort and contempt cases), then the state courts will deal with them in specific fact situations. These state rulings will then be examined by appellate and federal courts.

The function of any penalty is both punishment and deterrence. As was recognized by Judge Hardy of the District Court of Arizona in the recent case of Polykoff v. Collins (copy in Appendix), substantial deterrence is entirely proper. Judge Hardy upheld the criminal fines of Arizona, which reach up to One

Million Dollars for corporations, because there was no evidence that state judges have, or would ever, exact unreasonable fines in circumstances where it would be unfair in relation to the offense. The Arizona Supreme Court has provided the state judiciary with guidelines for fines by adopting portions of the ABA's Standards for Criminal Justice Relating to Sentencing Alternatives and Procedures, Sections 2.7(b) and (c). In re Collins, 108 Ariz. Rpts. 310, at 312-13, 497 P.2d 523 (1972). These standards provide that a court "should consider" financial resources as well as deterrence.

These criteria allow a judge to levy a fine that will be sufficient to deter future criminal activity, but will not unfairly destroy a defendant financially. There is no reason to assume that Washington's judiciary cannot be trusted

to follow these or similarly fair guidelines.

The state courts can also conduct fact finding sentencing hearings to determine the proper penalty, as is done in federal courts under 18 U.S.C. 3577. See: U.S. v. Fatico, 441 F.Supp. 1285 (E.D.N.Y. 1977) ("Fatico I"), rev'd, 579 F.2d 707 (2d Cir. 1978), on remand, 458 F.Supp. 388 (E.D. N.Y. 1978 ("Fatico II"), aff'd 603 F.2d 1053 (2d Cir. 1979). See also: U.S. v. Ammirato, 670 F.2d 552 (5th Cir. 1982).

Finally, since this Court was deprived of its stated desire to review the one-year closure remedy for an obscene nuisance which was upheld by the Idaho Supreme Court, it should not now allow the Ninth Circuit opinion to stand as authority that equitable remedies are unlawful because they are not pre-set by the legislature. See State, ex rel.

Kidwell v. U.S. Marketing, 631 P.2d 622, upon which jurisdiction was noted but the appeal was dismissed by U.S. Marketing over the State's objection, 454 U.S. 1140, 455 U.S. 1009. If total closure for one year can be a lawful punishment for past misconduct, and forfeitures of unlimited properties and funds can be assessed in tax, contempt, and racketeering cases, then the Washington civil penalty scheme is also entitled to case-by-case application and review in its own courts. It should not be presumed invalid, for this also assumes "bad faith" on the part of the Washington judiciary. This is a grave blow to federalism which this Court should not tolerate.

## CONCLUSION

The federal courts should never have entertained the Complaint in this case. The new statute could not be found so totally invalid that it could not be applied constitutionally, and its interpretation and application properly belonged in state court. This Court must fashion new and clear guidelines to prevent federal courts from continuing to act as "super-legislatures".

The state legislatures and court systems are entitled to an honest deference. Unless a challenged law meets the test of Watson v. Buck, supra, the federal courts should be said to lack subject matter jurisdiction to review them, even when no pending case is begun in state court. Indeed, Washington's courts never got a chance to even review the statutes. This was grossly unfair, and unnecessary. The whole body of

obscenity and First Amendment cases provide adequate guidelines for state courts to follow and this Court should let them do so.

Respectfully submitted,

Tom Collins
Maricopa County Attorney
Amicus Curiae

Sandor O. Shuch
Deputy County Attorney

By: Bruce A. Taylor
Attorney for Amicus Curiae

# APPENDIX

Polykoff, et al. v. Collins,

___ F.Supp. ___,

No. CIV 84-1101

(D.Ariz. 1984)

(Filed July 11, 1984)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

| | | |
|---|---|---|
| Louis Polykoff, IAS, Inc., Charles Stuart, Charles Clapp, Jess Emery, David Fuehring, Modernworld, Inc., Tony Dumbsky, Bill Henderson, Elise White, and Michael Kaplan, Plaintiffs, v. Thomas E. Collins, in his official capacity as County Attorney for Maricopa County, Arizona, Defendant. | ) | No. CIV 84-1101 PHX CLH<br><br>MEMORANDUM OPINION AND ORDER |

Invoking the Civil Rights Act, 42 U.S.C. §1983, plaintiffs Louis Polykoff, IAS, Inc., Charles Stuart, Charles Clapp, Jess Emery, David Fuehring, Modernworld, Inc., Tony Dumbsky, Bill Henderson, Elise White, and Michael Kaplan seek a declaratory judgment and injunction restraining defendant Thomas E. Collins, in his official capacity as the Maricopa County Attorney, from prosecuting them for violations of section 13-3502 of the

Arizona Revised Statutes on the basis that this statute abridge rights secured by the First and Fourteenth Amendments of the United States Constitution. At the close of the hearing for the plaintiffs' application for preliminary injunction, the parties stipulated that the Court's findings of fact may be deemed conclusive and that a trial on the merits would not be necessary. The trial of this action on the merits, therefore, will be deemed consolidated with the hearings for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65(a)(2). The following memorandum opinion will serve as the Court's findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52.

I. FACTS

The plaintiffs are corporations and individuals who are either owners or employees of stores that sell materials,

such as magazines or films, depicting adults engaged in various sexual activities. These stores are located in Maricopa County. The defendant, as the County Attorney, is charged with the duty of prosecuting persons who violate the state laws within Maricopa County.

Under the A.R.S. §13-3502, a person who knowingly sells or offers to sell any "obscene item" is guilty of a class 6 felony. An item is obscene as the term is used in §13-3502 when:

> (a) The average person, applying contemporary state standards would find that the time, taken as a whole, appeals to the prurient interest; and
> (b) The item depicts or describes, in a patently offensive way, sexual activity as that term is described herein; and
> (c) The item taken as a whole, lacks serious, literary, artistic, political or scientific value.

A.R.S. §13-3501.2. Under Arizona's sentencing statutes, an enterprise and an individual guilty of a class 6 felony may

be punished by imposition of fines of up to $1,000,000 and $150,000 respectively. A.R.S. §13-804, 13-801.

The defendant has successfully prosecuted a number of adult book store owners for violations of §13-1302. Fines of up to $7,500, all pursuant to plea agreements, have been imposed by the Maricopa County Superior Court. The defendant would prosecute the plaintiffs if there were probable cause to believe that they violated §13-3502.

Plaintiffs' complaint seeks, in addition to injunctive relief, a judgment declaring §13-3502 unconstitutional on two grounds: first, the statute's use of the term "prurient interest" to define obscenity, as it has been interpreted by the Arizona Supreme Court in State v. Bartanen, 121 Ariz. 454, 591 P.2d 546, cert. denied, 444 U.S. 884 (1979), renders §13-3502 overbroad and, second,

the classification of violations of §13-3502 as a class 6 felony, punishable by fines of up to $1,000,000, is a prior restraint upon the plaintiffs' freedom of speech.

II. JURISDICTION AND ABSTENTION

The jurisdiction of this Court is based upon 28 U.S.C. §1343(a)(4), which implements the Civil Rights Act. Although the plaintiffs have not been prosecuted under §13-3554, the fact that other owners of adult book stores have been prosecuted is a sufficient threat of prosecution to create the jurisdictional predicate of an "actual controversy." See Steffel v. Thompson, 415 U.S. 452, 459 (1974); cf. Ellis v. Dyson, 421 U.S. 426 (1975). Accordingly, the Court finds that it has jurisdiction over this case.

The defendant first contends that the Court should abstain from exercise of its jurisdiction in favor of pending

state litigation concerning the same controversy. It is, however, a "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976). Therefore, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." Id. at 813. There are three general categories of abstention, none of which are applicable to this case:

First, abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented by a state court determination of pertinent state law." County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959). The defendant has not suggested a construction §13-3502 that would obviate the plaintiffs'

constitutional challenge. Section 13-3502, moreover, has been authoritatively construed in its relevant parts by the Arizona Supreme Court in State v. Bartanen, 121 Ariz. 454.

Second, abstention is also appropriate when the case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Colorado River Conserv. Dist., 424 U.S. at 814. In this case, the Court is not called upon to construe state law in view of state policy. Rather, state law will be considered in the context of a federal constitutional challenge.

Finally, abstention is appropriate when "federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, . . . state nuisance proceedings antecedent to a

criminal prosecution, which are directed at obtaining closure of places exhibiting obscene films, . . . or collection of state taxes." Id. at 816 (citations omitted). At this time there is no pending state criminal prosecution or state nuisance proceeding against the plaintiffs.

In view of the above considerations, defendant's bid for abstention appears to be based merely upon a preference for having the constitutionality of this statute determined in state court. This is not a legitimate reason for a federal court to decline to exercise jurisdiction and, therefore, the Court will deny the plaintiffs' motion to dismiss. See, e.g., J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984); Kit-Dal Cinema v. Village of Downers Grove, Ill., 534 F.Supp. 81 (N.D.Ill. 1981).

III. THE OVERBREADTH ISSUE

The plaintiffs first contend that §13-3502 is facially overbroad insofar as it outlaws expression protected by the First Amendment and, therefore, must be declared unconstitutional. Application of the First Amendment overbreath doctrine to bar all enforcement of a statute is "strong medicine" and, accordingly, has been applied "with hesitation, and then only as a last resort." New York v. Ferber, 458 U.S. 747, 769 (1982) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). Three requirements must be met before §13-3502 may be declared invalid on its face. First, the statute must bring within its sweep expression protected by the First Amendment. J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 486 (9th Cir. 1984); Wurtz v. Disley, 719 F.2d 1438, 1440 (9th Cir. 1983). Second,

the statute must not be readily subject to a narrowing construction by the state courts which might cure the constitutional deficiency. See Ferber, 458 U.S. at 769 n. 24; Erznoznik v. City Jacksonville, 422 U.S. 205, 216 (1975). Third, the deterrent effect on legitimate expression must be both real and substantial. Erznoznik, 422 U.S. at 216; see also Ferber, 458 U.S. at 769-70. A discussion of each of these requirements of the overbreadth doctrine will not be necessary, however, because the Court finds that §13-3502 does not prohibit legitimate expression.

Section 13-3502 defines obscenity by adopting the tripartite test established in Miller v. California, 413 U.S. 15, 24, rehearing denied, 414 U.S. 881 (1973). One definitional element of obscenity, thus, is that the item "appeal to the prurient interest." A.R.S. §13-501.2(a).

The plaintiffs' first point of contention with respect to §13-3502 is that the term "prurient interest " as defined by the Arizona Supreme Court in State v. Bartanen, 121 Ariz. 454, is unduly broad.

In Bartanen, the Arizona Supreme Court approved the following jury instruction concerning the meaning of "prurient interest:"

> The term appeal to the prurient interest means to excite lustful thoughts, a shameful or morbid interest in sex or nudity, arouse sexual desires or sexually impure thoughts, inclined to or disposed to lewdness, having lustful ideas or desires.
>
> . . . .
>
> The term prurient interest in sex is not the same as a candid, wholesome, or healthy interest in sex. Material does not appeal to the prurient interest just because it deals with sex or shows nude bodies. Prurient interest is an unhealthy, unwholesome, morbid, degrading or shameful interest in sex, a leering or longing interest. An appeal to the prurient interest is an appeal to sexual desire, not an appeal to sexual interest. An interest in sex is normal, but if the material appeals to an abnormal interest in

> sex, it can appeal to the prurient interest. . . .

121 Ariz. at 458. Taking inventory of the various definitions of "prurient interest" developed by courts and legal authorities, the Arizona Supreme Court concluded that there were in use essentially two definitional standards for this term: the "appeal" approach, an "appeal to a morbid, shameful, disgusting, unhealth, unwholesome, degrading interest in sex," and the "tendency" approach, a tendency "to excite lustful ideas or desires." See 121 Ariz. at 459-60. Without expressing a preference for one over the other, the court determined that the instruction was valid because it combined the two standards:

> The position taken by the trial court that an "appeal to the prurient interest" is to be judged by both the objective nature of the material and the human instincts which it tends to arouse is correct

> under the facts of this case. We believe therefore that the instructions, when read as a whole, provided the jury with an adequate and sufficient direction upon which they could reach a proper verdict based on the evidence before them.

121 Ariz. at 460. As a result of the Bartanen decision, the instruction approved therein has become a standard jury instruction for obscenity prosecutions in the Arizona courts.

The plaintiffs contend that the Arizona Supreme Court's interpretation of "prurient interest" must be viewed as unconstitutional in light of the recent Ninth Circuit opinion, J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482. In J-R Distributors, the Ninth Circuit was called upon to determine the validity of the State of Washington's anti-obscenity statute, which defined "prurient interest" as "that which incites lasciviousness or lust." 725 F.2d at 490. The court concluded that "prurient

interest" is "a shameful or morbid interest in nudity, sex or excretion." Id. at 491. The court also observed that the contemporary meaning of "lust" was little more than sexual desire, "a healthy, wholesome, human reaction common to millions of well-adjusted persons in our society." Id. at 490. As a result, lust could not properly be regarded as a connotation of the "prurient interest" and, because the Washington statute defined "prurient interest" in the alternative as lust, the statute was overbroad and unconstitutional. Id. at 491.

This Court, of course, must follow all decisions of the Ninth Circuit Court of Appeals. This Court concludes, however, that the Arizona Supreme Court's discussion of the term "prurient interest" is not inconsistent with that of the Ninth Circuit in J-R Distributors.

The basis for the Ninth Circuit's ruling was that, under the Washington statute, materials found to incite lust might be deemed to "appeal to prurient interest" regardless of whether the materials also appealed to "a shameful or morbid interest in sex, nudity or excretion.' Under this Court's reading of Bartanen and the jury instruction approved therein, "prurient interest" under §13-3502 is defined as appealing to a shameful, disgusting, unhealthy, unwholesome, degrading, interest in sex as well as tending to excite lustful ideas or desires. Nowhere in the Bartanen opinion are these standards stated as alternatives, such that one standard may serve as a basis for a find§ing of "prurient interest" independently of the other. The Bartanen Court, perhaps, assumed that "lust" was synonymous with "a shameful or morbid

interest" in sex. Regardless, the Bartanen Court left no room for a jury to base a finding of prurient interest upon a finding of a tendency in the material to cause lust under the contemporary meaning of that term. The jury instruction approved by the court as a proper definition of "prurient interest" repeatedly defines "prurient interest" as something abnormal, "an unhealthy, unwholesome, morbid, degrading, or shameful interest in sex." This is the definition approved by the Ninth Circuit in J-R Distributors and, therefore, §13-3502 is not unconstitutionally overbroad.

IV. THE PRIOR RESTRAINT ISSUE

Under §13-3502, the sale of obscene items is a class 6 felony. In Arizona, a class 6 felony committed by an individual is punishable by imprisonment of a fine of up to $150,000. A.R.S. §13-801 A.

The same felony committed by an enterprise may be punished by a fine of up to $1,000,000. A.R.S. § 13-804.1. The plaintiffs second contention is that the criminal fine provisions, as applied to violations of §13-3502, operate as a prior restraint upon their freedom of speech and, therefore, §13-3502 must be declared invalid.

The plaintiffs again rely on J-R Distributors, where the Ninth Circuit ruled that the civil penalty provision contained within the Washington anti-obscenity statute was unconstitutional. The statute provided that once it has been determined "that a defendant has with knowledge maintained a moral nuisance, the court shall impose a civil penalty and judgment of an amount as the court may determine to be appropriate. In imposing the civil penalty, the court shall consider the

willfulness of the defendant's conduct and the profits made by the defendant attributable to the moral nuisance." J-R Distributors, 725 F.2d at 493. The court observed that "the civil fine, which is premised in part on profits 'attributable to the moral nuisance,' may be based on profits from the sale of protected materials in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there." Id. at 494. The court held "that it is impermissible, in an anti-obscenity statute, to provide that the amount of a fine shall be based, even in part, on the proceeds from constitutionally protected material." Id.

The Ninth Circuit's analysis employed two lines of First Amendment law. First, the civil penalty provision,which was attached only to the anti-obscenity statute, created

differential treatment for First Amendment activity. The provisions, thus, was presumptively unconstitutional. J-R Distributors, 725 F.2d at 495-496; see Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, ___ U.S. ___, 103 S.Ct. 1365, 1375, 75 L.Ed.2d 295 (1983). Second, the civil penalty provision was perilously similar to padlocking statutes insofar as both "have the effect of preventing the dissemination of protected speech simply because obscene speech originated from the same location." Id. at 495. In Near v. Minnesota, 283 U.S. 697 (1931), an early decision establishing the doctrine of prior restraint, the evil of prior restraint was found in an abatement statute that provided that upon violation no further publications could be made--regardless of whether the subsequent publication was non-obscene or

non-libelous--unless approval was received from a local court. In J-R Distributors, the restraint was an economic sanction, not a padlock on a door. It was designed, nevertheless, with the same purpose of abating a moral nuisance. The civil penalty provision, thus, was deemed a form of prior restraint and therefore unconstitutional. Id.

J-R Distributors does not require that §13-3502 be declared unconstitutional. First, unlike the Washington statute, §13-3502 does not establish differential treatment of first amendment activity with respect to the imposition of fines. Enterprises or individuals who violate §13-3502 are penalized under the same guidelines as any other class 6 felon. Thus, this statute does not carry with it a presumption of unconstitutionality.

Second, and most importantly, the criminal fine provisions in question, §§13-801 and 13-804, does not authorize sentencing judges to use criminal penalties as a form of prior restraint. As the Supreme Court noted in Near v. Minnesota, 283 U.S. at 711, one objectionable aspect to abatement statutes such as a padlocking statute is that "[t]he object is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." A statute authorizing criminal fines for violation of an obscenity law is distinguishable from a statute designed to abate moral nuisances on the basis that the former serves the legitimate purpose of punishing illegal conduct while the latter is clearly directed toward suppression of speech. Arizona's sentencing provisions do not permit courts to use criminal fines for

suppressive purposes. In In Re Collins, 108 Ariz. 310, 311012, 497 P.2d 523 (1972), the Arizona Supreme Court adopted the American Bar Association's Minimum Standards for Criminal Justice Relating to Sentencing Alternatives and Procedures, §2.7(b) and (c):

> (b) Whether to impose a fine in a particular case, its amount up to the authorized maximum, and the method of payment should remain within the discretion of the sentencing court. The court should be explicitly authorized to permit installment payments of imposed fine, on conditions tailored to the means of the particular offender.
>
> (c) In determining whether to impose a fine and its amount, the court should consider:
>
> (i) the financial resources of the defendant and the burden that payment of a fine will impose, with due regard to his other obligations;
>
> (ii) the ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court;
>
> (iii) the extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or

> reparation to the victim of the crime; and
>
> (iv) whether there are particular reasons which make a fine appropriate as a deterrent to the offense involved or appropriate as a corrective measure for the defendant.

These guidelines are designed to insure that criminal fines are used only for deterrent purposes and are not so severe as to pose an unreasonable debt upon the defendant. The criminal fine provisions applicable to violations of §13-3502, therefore, do not constitute a prior restraint of the likeness of the civil penalty provision in J-R Distributors.

V. THE CHILL ISSUE

The plaintiffs make the additional argument that the criminal fine provisions applicable to violations of §13-3502 are unconstitutional because their effect is to "chill" the exercise of First Amendment rights. This contention is essentially that these

provisions not only permit a prior restraint to result from the imposition of severe fines, but also force the plaintiffs to engage in self-censorship for fear of violating §13-3502 and, thereby, becoming subject to the fines of §13-801 and §13-804.

The Court first of all questions the legitimacy of the plaintiffs' complaint of a chill, given the guidelines imposed in In Re Collins. But assuming that an actual chill does exist, it would seem imprudent to require, as a matter of Constitutional law, that the chill be redressed by imposing substantive limitations on the power of a state to punish individuals lawfully convicted of obscenity law violations. The chill complained of in this case is nothing more than deterrence, a state objective the legitimacy of which is implied by the fact that obscenity may be outlawed. The

Supreme Court has compensated for the ambiquities in the definition of obscenity by imposing the requirement of scienter as an element of obscenity offenses. Mishkin v. New York, 383 U.S. 502, 511 (1966). This Court disagrees with the plaintiffs' contention that the sentences or fines imposed for violations of obscenity laws must also be restricted to protect the exercise of First Amendment freedoms.

IT IS ORDERED denying plaintiffs' application for injunctive relief.

IT IS FURTHER ORDERED directing entry of judgment in favor of the defendant.

Dated this 10th day of July, 1984.

/S/ Charles L. Hardy

CHARLES L. HARDY
Judge of the United States
District Court

cc: all counsel of record

## CERTIFICATE OF SERVICE

On this 12th day of November, 1984, six (6) copies of this Brief Amicus Curiae were placed in the U.S. Mail, first class postage prepaid, to each of the attorneys required to be served:

John H. Weston, Esq.
Brown, Weston & Sarno
433 N. Camden Drive #900
Beverly Hills, CA 90210
(213) 550-7460
Attorney for Appellees

Christine Gregoire, Esq.
Deputy Attorney General
State Capitol
Olympia, WA 98504
(206) 573-6228
Attorney for Appellants

David A. Saraceno, Esq.
Deputy Prosecuting Attorney
S & T Building
West 1115 Broadway
Spokane, WA 99260
(509) 456-5719
Attorney for Appellant-
Donald Brockett

In addition, a copy will be sent to each attorney representing an amicus curiae in this case, as their identities become known.

Bruce Taylor

Bruce A. Taylor
Attorney for Amicus Curiae